No. 84-336 (3)

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IN THE

Supreme Court of the United States

October Term, 1984

JAMES BUSHEY, *et al.*,

Petitioners,

against

NEW YORK STATE CIVIL SERVICE COMMISSION, *et al.*,

Respondents,

GERALD A. WELLS, *et al.*,

Respondents-Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Questions Presented

1. Whether a state agency faced with civil service promotional examination results that have sufficient adverse impact on minority candidates as to be presumptively discriminatory against those candidates, is free under Title VII to adopt voluntary remedial scoring measures before promulgation of the promotional eligibility list.

2. Whether, in light of the Court of Appeals' remand for development of a fuller record and in light of imminent events which will either render the cause moot or substantially alter its procedural posture and substantive significance, this Court should decline to hear this interlocutory request for review.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

A. Facts

The gravamen of the plaintiffs' claims is that defendant New York State Civil Service Commission ("Civil Service") chose not to employ the raw numerical results of a civil service promotion examination because those results heavily favored white candidates over minority can-

didates. The Court of Appeals for the Second Circuit held that because the raw numerical results had sufficiently adverse impact on black candidates as to be presumptively discriminatory on the basis of race, Civil Service was entitled to score the examination in some race conscious fashion in order to ameliorate the adverse impact of the raw exam results on black candidates. The Court of Appeals did not reach the question of whether the particular race conscious remedy Civil Service chose was appropriate, holding instead that the record was insufficient on that question and remanding for development of "the relevant question under *Weber* [*United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979)] . . . whether in practical terms the plan 'unnecessarily trammel[ed] the interests'" of the plaintiffs. 733 F.2d 220, 228; Petition, pp. 17a-18a,* quoting *Weber*, 443 U.S. at 208.

Civil Service's decision to adjust the raw results of the examination at issue, Correction Captain Examination No. 37-526, occurred after a decade of litigation concerning the racial impact of Civil Service examinations for the positions of Correction Sergeant, Correction Lieutenant and Correction Captain. That litigation history is set forth briefly here.

In 1972, Civil Service administered a written examination for the position of Correction Sergeant. That test was invalidated as discriminatory against racial minori-

* Plaintiffs' "Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit," dated August 30, 1984, including appendices thereto, is cited herein as "Petition, p. ——." The opinions below in this case are cited herein both as they appear in the reports and as they appear in appendices to the Petition.

ties* by the United States District Court for the Southern District of New York in 1974, and Civil Service was directed to develop a new promotional selection device. *Kirkland* v. *New York State Department of Correctional Services*, 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (hereinafter "*Kirkland Sergeants*"). Between 1974 and 1979, Civil Service developed and administered a new Correction Sergeant selection procedure consisting of both a written examination and evaluations of sergeant candidates' performance as Correction Officers.

In development of the new selection procedures, Civil Service found that members of racial minority groups characteristically ranked higher on job performance evaluations than on the carefully prepared "criterion validated" selection procedures, which included a written examination—showing, in short, that the raw written examination scores could not reliably be used as a rank-order predictor of job performance of whites relative to minorities.** Civil Service ameliorated the adverse racial impact by adding 250 points to the scores of minority candidates. White intervenors in the *Kirkland Sergeants* case argued unsuc-

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* Throughout the litigation history set forth here, as well as in the present litigation, the minority groups at issue have been blacks and hispanics. The Court of Appeals in this case remanded the question whether hispanics were properly included by Civil Service among minorities, along with blacks, as has traditionally been done, or among whites, for purposes of the race conscious scoring device Civil Service employed. Because defendants have not cross-petitioned here, that issue is not presented for this Court's review.

** This general conclusion is supported by a sampling taken during the *Kirkland Lieutenants* litigation (*see* pp. 4-6, *infra*) of performance evaluations of candidates for Correction Lieutenant. There, minority Correction Lieutenant candidates' job performance was found to be statistically indistinguishable from white candidates' performance, even though raw written test results had adverse impact against minority lieutenant candidates.

cessfully that this score adjustment was a racial quota or otherwise illegal. *Kirkland Sergeants,* 482 F. Supp. 1179 (S.D.N.Y.), *aff'd,* 628 F.2d 796 (2d Cir. 1980), *cert. denied,* 450 U.S. 980 (1981).

In light of the fact that successful candidates for Correction Sergeant comprise the candidate pool for Correction Lieutenant promotions, and ultimately for Correction Captain positions, Civil Service did not administer any Correction Lieutenant or Captain examinations during the pendency and implementation of *Kirkland Sergeants.* Nonetheless, employees of the New York State Department of Correctional Services (hereinafter "DOCS") obtained an order that under New York State law such examinations had to be administered forthwith. *Edgerton* v. *New York State Civil Service Commission,* 84 A.D.2d 881, 444 N.Y.S.2d 731 (3d Dep't 1981).

In light of the limited time allowed by the *Edgerton* order, Civil Service was unable either to consider alternatives to selection procedures solely based on written examinations, or to do the kind of criterion validation study done for the Correction Sergeants examination. Therefore, the Correction Lieutenant examination, administered on October 3, 1981, consisted solely of 60 written questions, and the Correction Captain examination (which was Examination No. 37-526, here at issue), administered on January 30, 1982, consisted solely of 103 written questions. Both of these written examinations yielded raw results with adverse impact on minority candidates. The Correction Lieutenant eligible list promulgated in December 1981 was challenged by lawsuit commenced on January 15, 1982

by a group of black and hispanic Correction Lieutenant candidates. *Kirkland* v. *New York State Department of Correctional Services,* 552 F. Supp. 667 (S.D.N.Y. 1982), *aff'd,* 711 F.2d 1117 (2d Cir. 1983), *cert. denied,* —— U.S. ——, 104 S. Ct. 997 (1984) (hereinafter "*Kirkland Lieutenants*"). By that lawsuit, the black and hispanic lieutenant candidates contended not only that the Correction Lieutenant examination results were discriminatory but that the use of those results for Correction Lieutenant selection would inevitably bias the Correction Captain examination against minorities by precluding minorities from adequate representation in the Correction Captain candidate pool.

The parties to *Kirkland Lieutenants* began negotiations toward settlement, and an agreement was reached in August, 1982 and submitted to the United States District Court for the Southern District of New York for approval. Under that settlement, the contested Correction Lieutenant examination would be used for appointments to Correction Lieutenant positions, but the raw results would be adjusted by use of a zone scoring system. Appointments from within each zone were to be made to candidates such that the proportion of minority appointments approximated the proportion of minority candidates in the eligible pool.

The *Kirkland Lieutenants* settlement further required that a new Correction Captain examination be given on a specified timetable, and that when that examination yielded an eligible list, that list would supersede any prior Correction Captain eligible list, including the list here at issue,

Eligible List No. 37-526. Finally, the *Kirkland Lieutenants* settlement provided that if the new Correction Captain examination yielded raw results with adverse racial impact, Civil Service

> "... shall consider application of one or more of the following techniques to minimize or eliminate adverse impact on minority candidates:
>
> i. Separate frequency distribution . . .;
>
> ii. Elimination of particular items [*i.e.*, examination questions] . . .;
>
> iii. Addition of items to off-set the adverse impact of other items."

Over the objections of white intervenors, the settlement was approved by the District Court by order dated November 9, 1982. The Court of Appeals affirmed and this Court denied the intervenors' petition for a writ of certiorari.

When Correction Captain Examination No. 37-526 was scored, the raw results were determined to have egregious adverse impact on minorities, well beyond the limits of the four-fifths rule,* and thus to be presumptively discriminatory. Rather than promulgate a presumptively discriminatory eligible list, in light of developing case law approving race conscious adjustments to presumptively discriminatory raw results, and in light of the failure to that point of attempted defenses in the Second Circuit of promotional or employment examination results which

* Equal Economic Opportunity Commission Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607.4(D), cited herein as the "four-fifths rule".

violated the four-fifths rule, Civil Service decided that some race conscious remedy was appropriate.*

Civil Service opted to use a separate frequency distribution, a standard elementary statistical device. The separate frequency distribution device, in short, separates the white candidates' scores and the minority candidates' scores, and "normalizes" them, which renders identical the means and standard deviations** of the two groups. The two normalized groups are then recombined into a single eligible list. The result is a list which treats candidates of all races equally. This technique is consistent with the four-fifths rule's presumption of discrimination, and with the finding that the racial differential in performance in DOCS promotional selection procedures, especially on written examinations, is not reflected by any similar racial differential in performance in DOCS employment. The separate frequency distribution scoring device is designed to remove only that score variation

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* The decision to make *some* race-conscious adjustment and the selection of separate frequency distributions as the particular adjustment, were distinct decisions both chronologically and substantively. The record on appeal contains little factual evidence pertaining to the selection of separate frequency distributions as the appropriate device, and thus the Court of Appeals remanded that question.

** A statistical mean is simply an arithmetic average—here, the normalization technique adjusts the white and minority means so that they are equal.

A standard deviation is a measure of "spread" or "variance" of a group of numbers. Here, the normalization process guarantees that the percentage of white candidates falling within any given point spread from the white candidates' mean, equals the percentage of minority candidates falling within that same point spread of the minority candidates' mean. In lay terms, the separate frequency distribution shapes the white candidates' scores into a bell curve, and shapes the minority candidates' scores into a bell curve, such that the bell curves' means are concurrent in width, then recombines the two bell curves into one.

presumptively attributable to the disparity between job performance and examination performance.*

The adjusted results of Examination No. 37-526 were promulgated as Eligible List No. 37-526 on September 9, 1982. This lawsuit was commenced on November 2, 1982 by fifteen white captain candidates who sought a preliminary injunction against appointments from Eligible List No. 37-526. By Stipulation and Order signed by the parties and approved by the United States District Court for the Northern District of New York on November 2, 1982, defendants consented to a stay against permanent Correction Captain appointments from Eligible List No. 37-526 pending further order. Having joined this litigation after the stay was agreed to and so ordered (but before the summary judgment motions and appeal here on review), the intervenors in this case moved before Judge Miner on October 5, 1984, to have the stay vacated. Judge Miner denied the motion, and therefore the Stipulation and Order precluding permanent appointments remains in effect, and approximately 55 Correction Captain positions have become available for permanent appointments.

During pendency of this litigation, the preparation, administration and scoring of the new Correction Captain examination mandated by the *Kirkland Lieutenants* settlement has continued apace. The written portion of the

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* As the Court of Appeals held, the separate frequency "did not displace any nonminority candidates from the eligible list . . . , did not place an absolute bar to the advancement of nonminority candidates, . . . was only temporary in nature[, and] . . . was tailored narrowly to eliminate the adverse impact of the test." 733 F.2d at 228, Petition, p. 18a. The Court of Appeals went on to hold that these facts alone do not satisfy the *Weber* question of whether plaintiffs' rights were "unnecessarily trammeled."

examination was administered on December 10, 1983, and the oral portion was administered early in 1984. Consultations between Civil Service and the expert hired pursuant to the *Kirkland Lieutenants* settlement continued through the summer, and on September 20, 1984, Civil Service received a recommendation from the expert as to how the examination should be scored. Civil Service expects to be able to promulgate a new Correction Captain eligible list within the next month.

As set forth *infra*, pp. 19-22, promulgation of the new eligible list will render moot plaintiffs' claims here.

B. The Proceedings Below

The complaint herein alleged violations of the Fourteenth Amendment to the United States Constitution, via 42 U.S.C. § 1983; 42 U.S.C. § 1981; Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* and 2000e *et seq.;* and various provisions of New York State law. Plaintiffs' motion for summary judgment sought judgment "on all causes of action for the relief sought in plaintiffs' complaint . . . ." Defendants' motion for summary judgment sought judgment against plaintiffs on all causes of action, including a judgment that thirteen of the fifteen plaintiffs lacked standing to sue.

The District Judge specifically held that no plaintiff had a cause of action under 42 U.S.C. § 1981 or § 1983, under the Fourteenth Amendment, or under Title VI. 571 F. Supp. at 1566-67, n.9; Petition, pp. 26b-28b, n.9. Further, the District Judge held that no plaintiff was entitled to any award of back pay. 571 F. Supp. at 1580-81; Peti-

tion, pp. 80b-81b.* Thus, the District Court's holding for plaintiffs was squarely and expressly limited to their Title VII claims. 571 F. Supp. at 1566-67; Petition, pp. 25b-26b. Finally, the District Judge granted defendants' motion to the extent that he held that plaintiffs Sweeney and Clark lacked standing to sue. 571 F. Supp. at 1580; Petition, 77b-78b.

The defendants and the intervenors appealed the decision of the District Court, but no plaintiff appealed. The Court of Appeals addressed only Title VII questions. *See* 733 F.2d at 222, 223, n.4; Petition, pp. 4a, 7a, n.4.**

The Court of Appeals held that a *prima facie* case of adverse racial impact could be shown here by resort to the four-fifths rule, among other methods, and that under Title VII a *prima facie* case of adverse impact was a sufficient predicate for voluntary, race conscious remedial action. The Court of Appeals did not approve the use here of a separate frequency distribution, as repeatedly implied by petitioners, but in fact only reversed the District Court's

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* The District Judge apparently merely declined to rule on plaintiffs' various claims under New York State law, although his citation to *Jong-Yul Lim* v. *International Institution of Metropolitan Detroit, Inc.*, 510 F. Supp. 722, 725 (E.D. Mich. 1981), suggests that he believed those claims to be beyond his subject matter jurisdiction. In any event, the subsequent decision of this Court in *Pennhurst State School and Hospital* v. *Halderman*, —— U.S. ——, 104 S. Ct. 900 (1984), makes plain that the federal judiciary lacks subject matter jurisdiction to compel state officials to comply with state law, and the Court of Appeals so held here. 733 F.2d at 223, n.4; Petition, p. 7a, n.4.

** Therefore, contrary to the repeated implications of the Petition, questions arising out of the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, and Title VI are not properly before this Court. Furthermore, the dismissal of plaintiffs Sweeny and Clark is not properly before this Court.

holding that the methodology was "fundamentally flawed" and remanded for proceedings on the question whether use of the separate frequency distribution device "unnecessarily trammeled" the rights of the plaintiffs.

Since the Court of Appeals declined to rule on the propriety of the separate frequency distribution used here, and since neither defendants nor intervenors presently seek review of that declination, the decision here of the Court of Appeals, with one exception, is utterly indistinguishable from the decision of the same Court of Appeals in *Kirkland Lieutenants, supra,* 711 F.2d 1117 (2d Cir. 1983), *cert. denied,* —— U.S. ——, 104 S. Ct. 997 (1984). The sole distinction, upon which ultimately plaintiffs base their entire case and their present petition, is that the *Kirkland Lieutenants* race conscious adjustment to presumptively discriminatory raw scores was performed pursuant to negotiated settlement of a lawsuit, whereas the race conscious adjustment to presumptively discriminatory raw scores here was performed by Civil Service without waiting to be sued.*

Defendants submit that case law, policy and pragmatism compel the rejection of the rule proposed by plaintiffs. It

* Plaintiffs' repeated insinuations that Civil Service somehow sought to conceal the fact or method of the adjustment here are ludicrous. The adjustment methodology was not approved by Civil Service until September 1, 1982, and Eligible List No. 37-526 was promulgated on September 9, 1982. Immediately upon promulgation, the scoring methodology became a matter of public record, and was in fact reviewed by a number of candidates. Obviously, given plaintiffs' extensive complaint dated November 2, 1982, plaintiffs had no difficulty obtaining the information they needed.

As to plaintiffs' statement that the examination itself has improperly been withheld by Civil Service, it is sufficient to note that on remand, Judge Miner has sustained Civil Service's objection that the examination itself is not relevant to any material issue in the case.

is absurd to proclaim that an employer must implement a presumptively discriminatory employment selection device and wait to be sued before Title VII will countenance any remedy addressed to the presumed discrimination.

Reasons for Denying the Writ

I

The Court of Appeals' Decision That, Given Presumptively Discriminatory Civil Service Examination Results, a Civil Service Department Is Free Under Title VII to Remedy That Presumptive Discrimination Voluntarily, Accords With Policy and Established Case Law Under Title VII, Including the Strong Preference for Voluntary Compliance With Title VII.

The Court of Appeals' opinion states three holdings under Title VII. First, a *prima facie* showing of adverse impact on minority candidates for promotion can be made by a statistical demonstration that the pass rate of minorities on the promotional examination was less than four-fifths of the pass rate of white candidates. Here the minorities' pass rate was 25%, while 49% of the white candidates passed.

Second, in light of such egregious *prima facie* adverse impact, a state agency is free under Title VII to adopt some race conscious remedial measure. In other words, the adoption of a race conscious remedy does not require the state agency to inquire whether the *prima facie* case can be

rebutted,* nor does it require the state agency to wait to be sued and adopt the remedial measure pursuant to settlement or court order.

Third, the Court of Appeals held that the record insufficiently illuminated the choice of the particular race conscious remedy, and remanded the question for further proceedings.

The first holding is a settled proposition of Title VII law. It is plain enough that egregious statistical disparity gives rise to a presumption of racial discrimination. *E.g., Connecticut* v. *Teal,* 457 U.S. 440, 443 and n.4, 445-51 (1982) (violation of four-fifths rule, and significantly lower mean test score for minority candidates); *New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 584-87 (1979) ("prima

* One generally accepted means of rebuttal in a litigation context is a showing that the contested selection device is "job related." *See, e.g., Guardians Association* v. *Civil Service Commission,* 630 F.2d 79 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981). Plaintiffs have throughout this litigation wrongly contended that defendants concede that Examination No. 37-526 was "job related." *See, e.g.,* Petition, pp. 4, 8, 11, 14, 16 and n.5. The admission supposedly quoted on page four of the Petition is in fact a paraphrase from plaintiffs' complaint, not a quote from defendants' answer. Defendants' answer states, in pertinent part: "[T]he selection procedure developed to select Correction Captains, which included use of Examination No. 37-526, is a valid selection procedure under Title VII and does measure the merit and fitness of candidates. . . ." The term "selection procedure" refers to the examination *as scored by use of the separate frequency distribution device,* not the examination alone. Defendants have always contended that the entire selection procedure at issue was job related, but have never conceded that the examination alone (*i.e.,* the candidates' raw scores) were sufficiently job related under Title VII to allow use of the raw scores as a promotional ranking device.

facie violation of [Title VII] may be established by statistical evidence. . . .").*

It is equally uncontroversial that remedial action can be undertaken, by settlement or by court order, upon such a showing of adverse racial impact. *E.g., Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248, 254 (1981) ("[i]f the trier of fact believes the plaintiff's evidence [*i.e.,* to prove a *prima facie* case], and if the employer is silent in the face of the presumption [of discrimination], the court must enter judgment for the plaintiff"); *Kirkland Lieutenants,* 711 F.2d at 1129-31 ("showing of a prima facie case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for a voluntary compromise containing race-conscious remedies"); *Stotts* v. *Memphis Fire Department,* 679 F.2d at 552-53 and n.10 (identifiable statistical disparity must exist before a decree may embody affirmative relief provisions"); *Guardians Association* v. *Civil Service,* 630 F.2d at 106 (absence of rebuttal of *prima facie* case based

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* *See also, Dothard* v. *Rawlinson,* 433 U.S. 321, 329-30 and n.12 (1977) (height and weight requirements met by 99.76% of men in Alabama, but only 58.87% of women in Alabama); *Kirkland Lieutenants,* 711 F.2d at 1130-31 ("statistical showing of adverse impact creates a 'presumption of Title VII discrimination'"); *Stotts* v. *Memphis Fire Department,* 679 F.2d 541, 552-53 and n.10 (6th Cir. 1982), *rev'd on other grounds,* —— U.S. ——, 104 S. Ct. 2576 (1984); *Setser* v. *Novack Investment Co.,* 657 F.2d 962, 968 (8th Cir. 1981) ("showing of conspicuous racial imbalance by statistics is sufficient"); *Guardians Association* v. *Civil Service Commission of the City of New York,* 630 F.2d at 88; *United States* v. *City of Alexandria,* 614 F.2d 1358, 1364 (5th Cir. 1980) ("[t]o make out a prima facie case of pattern or practice of discrimination in violation of Title VII, all that a private or government plaintiff need show initially is that there is a significant statistical disparity between the racial . . . composition of an employer's work force and that of the community from which the workers are hired").

on "significant disparate racial impact" shows violation of Title VII); *United States* v. *City of Alexandria*, 614 F.2d at 1364-66 (same).

Plaintiffs apparently recognize that these propositions are not easily assailable, and therefore they argue for a distinction between a remedy undertaken pursuant to settlement or judgment, and the very same remedy undertaken voluntarily. This distinction would violate Title VII's preference for voluntary action, *see, e.g., United Steelworkers* v. *Weber*, 443 U.S. at 200-08 ("[t]he very statutory words intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history' [citation omitted]," do not constitute a "legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy"); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("[c]ooperation and voluntary compliance were selected as the preferred means for achieving [the goals of Title VII]. . . . In the Equal Employment Opportunity Act of 1972 . . . , Congress amended Title VII . . . to promote voluntary compliance with the requirements of Title VII").*

* Contrary to plaintiffs' contentions here, the policy favoring compliance with Title VII is not limited to plans produced by negotiations, or to plans produced by any sort of adversary process. *See*, Petition, pp. i, 13, 20. The legislative purposes of Title VII, *see, e.g., United Steelworkers* v. *Weber*, 443 U.S. at 202-04, have nowhere been held to depend on negotiations or other adversary context. Plaintiffs' suggestion, ironic at best, is that a race-conscious remedy that is wholly voluntarily adopted, as here, is less favorable to whites such as plaintiffs than one negotiated under pressure of actual or threatened federal court action by minority candidates.

In addition, plaintiffs' rule would lead to impractical, inefficient and unfair results. Plaintiffs' rule would have required defendants to issue an eligible list based solely on raw scores that are presumptively discriminatory against minority candidates, and to begin making appointments from that list. If no suit were filed, the presumptively discriminatory list would be used for its full term. But the day a suit is filed the defendants could concede the litigation, stipulate to a race conscious remedy and implement it, even displacing appointees promoted from the presumptively discriminatory list. Or, the defendant could litigate the case, and, at trial, "choose to present no evidence" to rebut the *prima facie* case, *United States* v. *City of Alexandria,* 614 F.2d at 1364, obligating the trial court to enter judgment for plaintiff.*

To state the proposition is to betray its impracticality. The considered judgment of a state agency** is no less appropriate or valid under Title VII because it precedes rather than follows the filing of a lawsuit. Race conscious remedies are common in hiring, both by private employers, *e.g., United Steelworkers* v. *Weber,* 443 U.S. at 197, 208-09 (interim requirement that 50% hired be black), and by public employers using examinations. *See, e.g., Connecticut* v. *Teal,* 457 U.S. at 443 and n.4, *aff'g* 645 F.2d 133 (2d Cir.

* Thus, the presence of litigation in no way guarantees that a race conscious remedy will be thoroughly debated. The policies behind Title VII's preference for voluntary solutions have nothing to do with adversariness, as plaintiffs argue, and in fact, those policies are *best* served when a remedy is resorted to without any litigation at all. *See Kirkland Lieutenants,* 711 F.2d at 1128, n.14.

** Plaintiffs suppose that defendants' voluntary remedial action was "left to the unreviewed discretion of middle level state bureaucrats." Petition, p. 20. In fact, of course, the action was reviewed by the general counsel to Civil Service, by the president of Civil Service, and by the chain of command leading down from the president and from the general counsel.

1981) (pass point reduced five points "in an attempt to lessen the disparate impact of the examination").* Research reveals no case which requires that an employer demonstrate that it cannot rebut the presumption of racial discrimination before adopting a voluntary, race conscious remedy.

II

The Procedural Posture of This Case Militates Against the Interlocutory Review Sought by Plaintiffs.

A. The Court of Appeals Remanded the Case for Development of a Fuller Record on the Only Novel Question This Case Presents.

Having decided that "a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for employer-initiated, voluntary race-conscious remedies," 733 F.2d at 228; Petition, pp. 16a-17a (footnotes omitted), the Court of Appeals then faced the only novel question before it: whether Civil Service's choice of the separate

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* *See also Kirkland Lieutenants,* 711 F.2d at 1133-35 (zone scoring, and minority appointment ratio equal to percentage of minorities in applicant pool); *Stotts* v. *Memphis Fire Department,* 679 F.2d 579 (6th Cir.), *cert. denied,* 459 U.S. 969 (1982) (hiring and promotion "goals"); *Guardians Association* v. *Civil Service,* 630 F.2d at 106-08 and n.24 (interim requirement that 50% of candidates hired be minorities); *Culbreath* v. *Dukakis,* 630 F.2d 15, 19-20 (1st Cir. 1980) (various affirmative practices, including annual and long-term minority hiring ratios); *Kirkland Sergeants,* 628 F.2d at 798-99 (examination results re-scored by adding 250 points to raw scores of each minority applicant); *United States* v. *City of Alexandria,* 614 F.2d at 1362 (interim hiring ratios for minorities); *Williams* v. *City of New Orleans,* 543 F. Supp. 662, 682-83 (E.D. La. 1982), *aff'd,* 729 F.2d 1554 (5th Cir. 1984) (*en banc*) (separate frequency distributions for whites and minorities must be considered on future exams if raw results show adverse impact).

frequency distribution scoring device as the particular race conscious remedy to be applied here was permissible under Title VII. The Court of Appeals reversed the District Court's holding that the methodology selected was "fundamentally flawed" (733 F.2d at 224, 228; Petition, pp. 9a, 17a; quoting 571 F. Supp. at 1576; Petition, p. 64b), and held that the "revelant question" is "whether in practical terms the plan 'unnecessarily trammel[ed] the interests' of the nonminority employees." 733 F.2d at 228; Petition, pp. 17a-18a; quoting *United Steelworkers* v. *Weber,* 443 U.S. at 208. The Court of Appeals held that "the record is insufficient to determine" that question, and that therefore remand was necessary "for a full exploration of this disputed issue" of fact. 733 F.2d at 229; Petition, pp. 18a-19a.

The interlocutory nature of this Petition for review "of itself furnishe[s] sufficient ground for the denial" of the Petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916). *See also Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. Co.,* 389 U.S. 327, 328 (1967); *American Construction Co.* v. *Jacksonville, T. & K. R. Co.,* 148 U.S. 372, 384 (1893); *Maryland* v. *Baltimore Radio Show, Inc.,* 338 U.S. 912, 918 (1950).

Review of the separate frequency distribution scoring device is not ripe not only because of the procedural posture of this litigation, but also as a matter of substantive law. Research reveals only one other reported decision dealing with the propriety of the separate frequency distribution methodology, and there the methodology was not a central issue. *Williams* v. *City of New Orleans,* 543 F. Supp. at 682-83. Therefore, it is "desirable" that this

Court defer review of this issue until "further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. at 918.

B. Imminent Events Will Render Wholly or Largely Moot the Issues Presented by This Interlocutory Review.

Defendants expect to promulgate a new Correction Captain eligible list, as required by the settlement of *Kirkland Lieutenants,* within as little as a few weeks of the date of this brief. The *Kirkland Lieutenants* settlement was negotiated and drafted with the intention of all parties that the resulting eligible list would upon its promulgation supersede Eligible List No. 37-526, at issue here.

That plain intention of the *Kirkland Lieutenants* settlement was frequently restated during this litigation. As it began to appear likely that the stay against appointments from Eligible List No. 37-526 would remain in effect until the time the new eligible list is promulgated, defendants here repeatedly advised the parties both here and in *Kirkland Lieutenants* that the results of the examination here at issue (whether in the form of Eligible List No. 37-526 or in the form of some altered eligible list as sought by plaintiffs here) will be scrapped completely once the new list issues. Presumably motivated by this advice, intervenors here moved on October 5, 1984 to have the stay against appointments from Eligible List No. 37-526 lifted. That motion was denied without opinion by the District Court.

Defendants submit that promulgation of the new eligible list will render this litigation moot for two reasons.

First, there is no federal right—in particular, no Title VII right—to compel use of Eligible List No. 37-526, or of any other scoring of Correction Captain examination 37-526.* Plaintiffs' only federal right is to preclude *use* of an eligible list that discriminates against them because of their race. As to this right here, if any, plaintiffs' claim necessarily depends on defendants' actual or intended use of Eligible List No. 37-526. Obviously, if the stay against appointments from Eligible List No. 37-526 remains effective until that list is superseded, then no actual use of Eligible List No. 37-526 will have occurred, and no intention to use the list will any longer exist. In short, no plaintiff will have any federal claim.

Second, even if promulgation of the new list did not *per se* render moot this litigation, the actual operation of the new list will demonstrate the lack of standing of all or most of the remaining 13 plaintiffs. The District Judge here, although he granted defendants' motion to dismiss plaintiffs Clark and Sweeney for lack of standing to sue, denied the motion as to other plaintiffs because at that point "it [could] not be said as a matter of law that they would not suffer from the rescoring. While their low rankings make promotion appear unlikely, it is not at all certain that no promotion remains possible." 571 F. Supp. at 1579; Petition, p. 78b. When the new list issues, it will then be certain what the maximum number of appointments

* Plaintiffs have from time-to-time asserted state law rights. *E.g.*, Petition, pp. 3, 11 and 17. Such claims cannot be heard in federal court. *See Pennhurst State School and Hospital* v. *Halderman*, 104 S. Ct. 900.

would have been from the results of Examination 37-526, had appointments not been stayed. In fact, it now appears that the examination at issue could not have been used for more than approximately 55 appointments, had appointments not been stayed. Therefore, a number of plaintiffs who passed the examination with relatively low scores will presumably face proof "as a matter of law that they would not suffer from the rescoring." *Id.* In addition, an as yet uncertain number of plaintiffs here will presumably receive offers of appointment from the new eligible list, many of them within the next few weeks, thereby mooting their injunctive and declaratory claims.* Therefore, it is quite possible that events in the next few weeks will render moot the claims of all of the plaintiffs.

Even probable or potential mootness is a sound basis for this Court to deny a writ of certiorari. *See, e.g., De Funis* v. *Odegaard*, 416 U.S. 312 (1974). That is especially so where the decision appealed from is a remand for further proceedings. It is true that both mootness and standing relate to the existence of an Article III "case or controversy," and therefore can be litigated *de novo* in this Court. However, where the justiciability of a cause turns on potentially complicated individualized factual issues, the wisest use of this Court's resources dictates allowing the trial court to develop the pertinent facts and review the applicable law of mootness and standing. The utility of this course is perhaps maximized where, as here, proceedings on remand to the District Court have continued during the briefing of this appeal, and, in fact, timing of those proceedings on remand could conceivably impel de-

* The District Court has already denied all plaintiffs' monetary claims, and that denial was not appealed.

fendants to raise mootness and standing issues by motion in the District Court before this Petition is decided.

Finally, this case is not one of the narrow category of those which are heard despite technical mootness because they are "capable of repetition yet evading review." *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n.2 (1972). *See, e.g., Roe* v. *Wade*, 410 U.S. 113, 125 (1973). Any doubt in that regard is erased by the fact that the new eligible list is being scored without the use of the separate frequency distribution device. In addition, the new list will presumably be used for the four-year maximum provided by state law, unlike Eligible List No. 37-526, the useful life of which was sharply limited by the *Kirkland Lieutenants* settlement.

Conclusion

The Petition for a Writ of Certiorari Should Be Denied.

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Respectfully submitted,

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